



State of California
Commission on Judicial Performance
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Date: December 20, 2010

To: Persons and Organizations Interested in Rules Relating to Proceedings of the Commission on Judicial Performance

From: Commission on Judicial Performance
Victoria B. Henley, Director-Chief Counsel

Subject: Invitation to Comment on Proposed Amendments to Rules of the Commission on Judicial Performance;

Policy Declaration 3.5 of the Commission on Judicial Performance provides that every two years, in even-numbered years, the commission shall review its rules and seek public comment on any proposed enactments, amendments or repeals. As part of the 2010 review of its rules, the commission has approved circulation of amendments to rule 102 [authorizing referral to FPPC], rule 109 [staff inquiry or preliminary investigation of subordinate judicial officer who has resigned or retired prior to an investigation by the local court], rule 122(g) [depositions – extending sunset clause], rule 129(b) [time for submission of proposed findings of fact and conclusions of law], rule 129(c) [time for preparation of report of the masters], and rule 130(c) [reply brief to the commission].

The proposed amendments with a brief explanation of the changes and a form for submission of comments can be found on the commission's Web site at www.cjp.ca.gov under Governing Provisions/Commission Rules. The deadline for comments is February 18, 2011.

Comments may be submitted by mail or facsimile to:

Commission on Judicial Performance
Attn: Janice M. Brickley, Legal Advisor to Commissioners
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102
FAX: (415) 557-1266

Proposal No. 1

THE PROPOSED ADDITION OF SUBDIVISION (p) TO RULE 102 WOULD AUTHORIZE DISCLOSURE OF INFORMATION REVEALING POSSIBLE VIOLATIONS OF THE POLITICAL REFORM ACT TO THE FAIR POLITICAL PRACTICES COMMISSION.

The proposed amendment would add the following subdivision to rule 102, which provides for confidentiality and disclosure in commission proceedings:

(p) (Disclosure of information to Fair Political Practices Commission) The commission may release to the Fair Political Practices Commission (FPPC) at any time information which reveals possible violation of the Political Reform Act or FPPC Regulations by a judge, former judge, subordinate judicial officer or former subordinate judicial officer.

Explanation of Proposed Amendment to Rule 102

As currently written, the commission rule concerning confidentiality permits disclosure of information to the Fair Political Practices Commission (FPPC), as a regulatory agency, only upon the retirement or resignation of a judge. The commission has received information concerning possible violations of the Political Reform Act or FPPC regulations by a current judge which occurred during a judicial campaign or under other circumstances. Under the existing rules, the commission does not have authority to report that information to the FPPC. Rule 102 allows for disclosure of confidential information concerning a judge in other contexts, such as to prosecuting authorities and to the Chief Justice when a judge is under consideration for judicial assignment. The proposed amendment would authorize disclosure to the FPPC when the commission has information which reveals that the judge may have violated the Political Reform Act or FPPC regulations.

Proposal No. 2

THE PROPOSED ADDITION OF SUBSECTION (5) TO SUBDIVISION (c) OF RULE 109 WOULD AUTHORIZE A STAFF INQUIRY OR PRELIMINARY INVESTIGATION OF A COMPLAINT AGAINST A SUBORDINATE JUDICIAL OFFICER (SJO) THAT WAS CLOSED BY THE LOCAL COURT BECAUSE THE SJO RESIGNED OR RETIRED.

The proposed amendment would add the following subsection to subdivision (c) of rule 109 which enumerates when the commission can authorize a staff inquiry or preliminary investigation of an SJO:

- (5) The commission receives a complaint concerning a subordinate judicial officer who resigned or retired before the local court received the complaint.

Explanation of Proposed Amendment to Rule 109

The commission has received complaints regarding SJO's that were closed by the local court without an investigation because the SJO retired or resigned before the complaint was received. Under existing rule 109(c)(1), the commission can open a staff inquiry or preliminary investigation of an SJO based on a request from a complainant within 30 days after being notified by the local court of its disposition of the matter if "the commission concludes that the local court may have abused its discretion in the disposition of such complaint." In situations where the SJO has retired or resigned and the court closes the complaint on that basis, there can be no abuse of discretion by the local court and thus, under the existing rule, no basis for the commission to open an investigation. The rule, as it stands, could prevent the commission from looking into serious cases of misconduct by an SJO, and exercising its authority to have the SJO declared unfit to serve as an SJO in any court.

Proposal No. 3

THE PROPOSED AMENDMENT TO RULE 122(g)(2) CONCERNING DISCOVERY DEPOSITIONS WOULD EXTEND THE SUNSET CLAUSE UNTIL DECEMBER 31, 2012.

Currently, rule 122(g)(2), which allows for a limited number of discovery depositions during formal proceedings, provides that its provisions shall be operative until December 31, 2010, unless after review, they are reenacted by the commission. At its December 2010 meeting, the commission voted to temporarily extend the provisions pending the public comment period. The following amendment is proposed (amended language is reflected in italics, deletion of original language is reflected in strike-through):

The provisions of subpart (2) of subsection (g) of rule 122 shall take effect January 1, 2008, and shall be operative until ~~December 31, 2010~~ *December 31, 2012*, unless after review, they are reenacted by the commission.

Explanation of Proposed Amendment to Rule 122(g)(2)

In 2007, the commission adopted amendments to rule 122(g), expanding depositions permitted as discovery during formal proceedings. The amendment contains a sunset clause which provides that the provisions of subdivision (g), subsection (2) of rule 122 shall be operative until December 31, 2010, unless after review, it is reenacted by the commission. Depositions have been conducted pursuant to rule 122(g)(2) in only two formal proceedings. Because of the limited experiences with the amended rule, the proposed amendment would extend the sunset clause until December 31, 2012, to coincide with the next biennial rules review.

Proposal No. 4

THE PROPOSED AMENDMENT TO RULE 129(b) WOULD GIVE THE SPECIAL MASTERS DISCRETION TO SHORTEN THE TIME FOR SUBMISSION OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The proposed amendment would read (amended language is reflected in italics, deletion of original language is reflected in strike-through):

~~Within 30 days after mailing of the hearing transcript, Unless the~~ *masters specify an earlier date*, the examiner and the respondent judge shall submit to the masters proposed findings of fact and conclusions of law, with citations to the transcript and exhibits, ~~unless the masters waive the submission of such proposed findings and conclusions no~~ *later than 30 days after mailing of the hearing transcript*. Submission to the masters shall occur by a delivery that results in actual receipt by them of the documents on or before the specified due date for submission. *The masters may waive the submission of such proposed findings and conclusions.*

Explanation of Proposed Amendment to Rule 129(b)

The proposed amendment was submitted by Justice Stephen J. Kane of the Fifth District Court of Appeal, Judge Larry W. Allen of the Superior Court of San Bernardino County, and Judge Allan D. Hardcastle of the Superior Court of Sonoma County, who served as special masters in a recent formal proceeding. Currently the rule provides that the examiner and respondent judge shall submit to the masters proposed findings of fact and conclusions of law within 30 days after the mailing of the hearing transcript unless the masters waive the submission of such proposed findings and conclusions. The proposal would give the special masters discretion to shorten the amount of time for filing proposed findings and conclusions. The proposed amendment recognizes that 30 days for filing proposed findings and conclusions is not always necessary, particularly in cases that do not involve numerous witnesses, multiple counts or complex issues. In such cases, the proposed amendment would result in a more expeditious resolution of the matter to the benefit of the judge and the public.

Proposal No. 5

THE PROPOSED AMENDMENT TO RULE 129(c) WOULD SHORTEN THE AMOUNT OF TIME FOR SUBMISSION OF THE REPORT OF THE SPECIAL MASTERS AND PROVIDE FOR EXTENSIONS OF TIME WHEN NECESSARY.

Currently rule 129(c) provides that the masters' report shall be submitted to the commission within 60 days of the mailing of the hearing transcript or 30 days after the submission of the parties' proposed findings and conclusions, whichever occurs later. The following proposed amendment would shorten the amount of time for submission of the report to 45 days after mailing of the hearing transcript or 15 days after submission of the parties proposed findings and conclusions, whichever occurs later, and authorize the chair of the commission to grant an extension of time when appropriate:

Within ~~60~~ 45 days after mailing of the hearing transcript or within ~~30-15~~ days after submission of the parties' proposed findings of fact and conclusions of law, whichever occurs later, the masters shall submit a report to the commission. Prior to the submission of their report, the masters may require such additional briefing and argument by the examiner and the respondent judge as the masters may desire. Upon request of the presiding master, the chair of the commission or the chair's designee may grant additional time for the submission of the report of the masters to the commission.

Explanation of Proposed Amendment to Rule 129(c)

The proposed amendment recognizes that in most cases 45 days is a sufficient amount of time for preparation of the masters' report. If additional time is necessary in more complex matters or for other reasons, the chair of the commission or the chair's designee may grant additional time upon the request of the presiding master. The proposed amendment would shorten the formal proceeding process in most matters and result in a more expeditious resolution to the benefit of the judge and the public.

Proposal No. 6

THE PROPOSED AMENDMENT WOULD DELETE SUBDIVISION (c) FROM RULE 130 WHICH PROVIDES FOR THE SUBMISSION OF REPLY BRIEFS TO THE COMMISSION DURING FORMAL PROCEEDINGS.

Rule 130 allows the examiner and the judge to submit three briefs to the commission after the submission of the masters' report – an opening brief, response brief and reply brief. The proposal would delete subdivision (c) which authorizes the filing of a reply brief.

Explanation of Proposed Deletion of Subdivision (c) of Rule 130

Under current rule 130, both the judge and the examiner may file an opening brief, response brief and reply brief; each side's briefs are filed simultaneously. The response brief gives each party an opportunity to respond to the arguments raised by their opponent in the opening briefs. After the filing of the briefs, the examiner and the judge are given the opportunity to be heard orally before the commission. (Rule 132.) As such, each party is given ample opportunity to present their position and arguments to the commission without the necessity of a reply brief. Deleting this step would eliminate an unnecessary delay in the formal proceedings process.

COMMENT

Proposed Amendments to Rules of the Commission on Judicial Performance

Please copy this sheet. Use a separate sheet for each issue.

Rule:

Issue:

Comment:

Alternative proposal:

(Continue on back or on a separate sheet.)

Name: _____ **Title:** _____

Address:

Telephone: _____

Your comment may become public during the review of the proposed amended rules regarding the Commission on Judicial Performance. Thank you for your assistance.

Please return on or before February 18, 2011

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